Supreme Court, U.S.
FILED
SEP 13 1991
OFFICE OF THE CLERK

(2)

NO. 91-124
IN THE SUPREME COURT OF THE UNITED STATES
October Term 1991

ROBERT FRANCIS SWOYER,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Timothy P. Wile
Assistant Counsel-in-Charge
Appellate Section
Counsel of Record

John L. Heaton
Chief Counsel

Harold H. Cramer
Assistant Chief Counsel
Vehicle & Traffic Law Division

Pennsylvania Department of Transportation
103 Transportation & Safety Building
Harrisburg, Pennsylvania 17120
Area Code (717) 787-2830

INDEX

Page

Questions Presented 1

Counterstatement of the Case 2

Reasons Why the Writ Should Not Be Granted. 7

A. Swoyer's Motion for New Trial was a Nullity Under Pennsylvania Law and any Error the Trial Court Made by Denying the Fourth Continuance was Harmless Error. 8

B. The Trial Court's Refusal to Grant Swoyer a Fourth Continuance Was Proper Under Pennsylvania Law. 12

C. There is No Federal Issue that Merits the Granting of Swoyer's Petition for Writ of Certiorari. 17

D. Swoyer's Petition for Writ of Certiorari is Frivolous Warranting Sanctions Under Rule 42.2. 20

Conclusion 30

TABLE OF CASES

Camp v. Wood,
10 Watts 118 (Pa. 1840). 24

Department of Transportation, Bureau of Driver Licensing v. Grassi, 129 Pa.Cmwlth. 387, 565 A.2d 865 (1989), *appeal granted*, ___ Pa.___, 578 A.2d 931 (1990). 11, 27

Department of Transportation, Bureau of Driver Licensing v. Zurka, 135 Pa.Cmwlth. 238,
580 A.2d 466 (1990). 4, 10-11, 27

Farmer's National Bank & Trust of New Holland v. New Holland National Bank, 333 Pa. 428,
5 A.2d 198 (1939). 17

Felder v. Casey,
487 U.S. 131 (1988). 20

Free v. Bland,
369 U.S. 663 (1962). 19

In re Hall,
288 Pa.Super. 495, 532 A.2d 621 (1982) 17

Lighting Unlimited, Inc., Lighting Pittsburgh Division v. Unger Construction Co., 217 Pa.Super. 252,
269 A.2d 368 (1970). 15-16

Mackey v. Montrym,
443 U.S. 1 (1979) 9

Mashpee Tribe v. Watt,
542 F.Supp. 797 (D.Mass. 1982), *aff'd*, 707 F.2d 23 (1st Cir. 1983), *cert. denied*, 464 U.S. 1029 (1983) . . .19

McCoy v. Court of Appeals of Wisconsin, District 1,
486 U.S. 429 (1988) 22-23, 29

Moskowitz's Registration Case,
329 Pa. 183, 196 A. 498 (1938). 24

Phoenix Mutual Life Insurance Co. v. Radcliffe on the Delaware, Inc., 439 Pa. 159, 266 A.2d 698 (1970). 13

Pierce v. Penman,
357 Pa.Super. 225, 515 A.2d 948 (1986), *appeal denied*, 515 Pa. 608, 529 A.2d 1082 (1987) 17

Polk County v. Dodson,
454 U.S. 312 (1981) 23

Robinson v. Pennsylvania Board of Probation and Parole,
525 Pa. 505, 582 A.2d 857 (1990). 25-27

Shaw v. Department of Transportation, Bureau of Driver Licensing, 122 Pa.Cmwlth. 636, 553 A.2d 108 (1990). .10

Simpson's Estate,
253 Pa. 217, 98 A. 35 (1916). 24

Smith v. Gallagher,
408 Pa. 530, 185 A.2d 135 (1962). 24

Smith v. Pennsylvania Board of Probation and Parole,
524 Pa. 500, 574 A.2d 558 (1990). 27

Turnopolski v. Department of Transportation, Bureau of Driver Licensing, ___ Pa.Cmwlth. ___, 589 A.2d 289 (1991). 25

United States v. State Corporation Commission of Commonwealth of Virginia, 345 F.Supp. 843 (E.D.Va.1972), *aff'd*, 409 U.S. 1094 (1973) 19

Wall v. Wall, 123 Pa. 545, 16 A. 598 (1889). 24

STATUTES

U.S.Const. Art. VI, cl. 2 . . . . . 1, 7, 18-20

42 Pa.C.S. §762. 9

42 Pa.C.S. §5505 11

42 Pa.C.S. §5571 9

75 Pa.C.S. §1547 . . . . . 2, 9

75 Pa.C.S. §1550 . . . . . 3, 8

75 Pa.C.S. §3731 2

RULES OF COURT

Supreme Court Rule 42.2. . . . . 1, 20-21, 27, 29

Pa.R.A.P. 903. 9

Pa.R.A.P. 2744 . . . . . 5, 22, 26, 28

Pa.R.C.P. 216. 12-15

Pa.R.C.P. 227.1. . . . . 4, 10, 27

MISCELLANEOUS

Darlington, McKeon, Schuckers & Brown, 2 Pennsylvania Appellate Practice §2744:2 (1990 Supp.). 26

QUESTIONS PRESENTED

1. Whether the supremacy clause of the Federal Constitution, Article VI, Clause 2, requires a state trial court to grant a party a continuance, in a case where the party has no constitutional or statutory right to counsel and where the trial court lacks jurisdiction to grant the party the relief sought, after numerous prior continuances had already been granted to the party and the state trial court had previously ordered that no further continuances would be granted, because of that party's counsel's alleged commitment to appear before a Federal Court?

2. Whether this Petition for Writ of Certiorari is frivolous warranting the imposition of sanctions against the Petitioner and his counsel under Supreme Court Rule 42.2?

COUNTERSTATEMENT OF THE CASE

The facts of the case underlying this petition for writ of certiorari are as follows.

On June 11, 1987, Ronald Francis Swoyer (Swoyer) (Petitioner) was stopped and arrested for driving while under the influence of alcohol, a violation of 75 Pa.C.S. §3731, and was, pursuant to the Pennsylvania implied consent law, 75 Pa.C.S. §1547, requested to submit to a chemical blood alcohol test. Swoyer refused to do so and the police officer reported that refusal to the Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing (Department) (Respondent). By official notieed dated and mailed September 8, 1987, the Department notified Swoyer that his privilege to operate a motor vehicle was being suspended for one year pursuant to the Pennsylvania implied consent law as a result of his reported refusal to submit to chemical blood alcohol testing on June 11, 1987.

On or about October 7, 1987, Swoyer filed an

appeal with the Court of Common Pleas of Lehigh County, Pennsylvania, from that notice of suspension imposed by the Department. Swoyer's appeal was heard by the common pleas court *de novo*, in accordance with 75 Pa.C.S. §1550, and Swoyer's operating privilege suspension was automatically stayed until the common pleas court issued its final determination on Swoyer's appeal. On January 15, 1988, President Judge John E. Backenstoe found that Swoyer did in fact refuse to submit to chemical blood alcohol testing following his DUI arrest, in violation of the implied consent law, dismissed Swoyer's appeal and reinstated the one-year suspension of his operating privilege. Swoyer did not appeal the January 15, 1988, order of Judge Backenstoe dismissing his appeal and reinstating the operating privilege suspension.

On or about December 22, 1988, Swoyer filed a motion with the Court of Common Pleas of Lehigh County for a rehearing of the January 15, 1988, dismissal of his operating privilege suspension appeal. Although such motions are not

permitted by Pennsylvania law in statutory appeals such as Swoyer's operating privilege suspension appeal,[1] Judge Backenstoe nevertheless granted Swoyer a further stay of the one-year operating privilege suspension initially imposed in 1987. A hearing on the motion for rehearing was scheduled for January 31, 1988, but continued at the request of Swoyer's counsel. A second hearing was scheduled for March 13, 1989, which was also continued at the request of Swoyer's counsel due to counsel being required to appear in Federal court. A third hearing on the rehearing petition was scheduled for August 9, 1989, and that hearing was also continued at Swoyer's counsel's request due to counsel's commitment to appear in Federal court. When the third hearing was rescheduled, a fourth hearing was scheduled by Judge Backenstoe for October 5, 1989, and Judge Backenstoe clearly ordered that the hearing would be held on that date and

---

[1] *See* Pa.R.C.P. 227.1(g); *Department of Transportation, Bureau of Driver Licensing v. Zurka*, 135 Pa.Cmwlth. 238, 580 A.2d 466 (1990).

that Swoyer would be granted no further continuances.

On October 5, 1989, Swoyer's counsel again sought to continue the hearing on the basis that he was required to appear in Federal court. Judge Backenstoe refused to grant Swoyer a fourth continuance and dismissed the motion for rehearing.

Swoyer appealed Judge Backenstoe's order of October 5, 1989, to the Commonwealth Court of Pennsylvania. On September 10, 1990, a three-judge panel of the Commonwealth Court of Pennsylvania, in an unreported memorandum decision, affirmed the order of the Court of Common Pleas of Lehigh County dismissing Swoyer's motion for a rehearing of his operating privilege suspension appeal. Additionally, the Commonwealth Court of Pennsylvania determined that Swoyer's appeal of Judge Backenstoe's dismissal of his motion for rehearing was "wholly frivolous" within the meaning the Pennsylvania Rules of Appellate Procedure, Pa.R.A.P. 2744, and awarded the Department counsel fees

against both Swoyer and his appellate attorney. Swoyer filed for reconsideration of the decision of the three-judge panel of the Commonwealth Court and the Commonwealth Court denied reconsideration by order dated November 9, 1990.

Swoyer then filed a petition for allowance of appeal to the Supreme Court of Pennsylvania. The Pennsylvania Supreme Court denied Swoyer's petition for allowance of appeal by order entered May 2, 1991. On July 22, 1991, Swoyer filed the instant petition for writ of certiorari with this Honorable Court.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Swoyer's sole Federal issue upon which he bases his petition for a writ of certiorari is his contention that the Supremacy Clause of the Federal Constitution, Article VI, cl. 2, required Judge Backenstoe to grant him a fourth continuance of the hearing on his motion for rehearing because his counsel had a commitment in Federal court. The denial of Swoyer's request for a fourth continuance regarding his motion for new trial or rehearing in his operating privilege suspension appeal, upon which Swoyer's Federal supremacy issue is based, is not dispositive of his case since the underlying motion itself is not authorized by Pennsylvania law and the common pleas court lacked the power to grant Swoyer a rehearing or new trial. Thus, even if the common pleas court erred in not granting Swoyer the fourth continuance his counsel sought, the error would constitute harmless error. Accordingly the Department respectfully submits to this Honorable Court that Swoyer's purported Federal issue under Article VI, cl. 2, of the Federal Constitution does not

warrant review by this Honorable Court.

A. Swoyer's Motion for New Trial was a Nullity Under Pennsylvania Law and any Error the Trial Court Made by Denying the Fourth Continuance Was Harmless Error.

This case is primarily the latest stage of a motorist's determined and persistent effort to avoid the mandatory penalty set by the Pennsylvania General Assembly for motorists who are arrested for drunk driving and who refuse to submit to a chemical blood alcohol test as required by the provisions of Pennsylvania's implied consent law. The Department imposed such a suspension on Swoyer when he refused such a chemical test. Swoyer appealed that suspension pursuant to 75 Pa.C.S. §1550 was provided with the *de novo* hearing on the fact of his refusal of chemical blood alcohol testing before the Court of Common Pleas of Lehigh County, Pennsylvania. The common pleas court, after hearing the evidence, found that Swoyer had in fact violated the requirements of the Pennsylvania implied consent law by refusing to submit to a chemical test that and the mandatory one-year suspension of his privilege to operate a motor

vehicle was warranted under 75 Pa.C.S. §1547. The common pleas court's order dismissing Swoyer's appeal was entered January 15, 1988. This procedure more than satisfied Swoyer's due process rights under this Honorable Court's decision in *Mackey v. Montrym*, 443 U.S. 1 (1979).

Under Pennsylvania law, Swoyer had 30 days to appeal Judge Backenstoe's January 15, 1988, order dismissing his 1987 appeal to the Commonwealth Court of Pennsylvania. *See* 42 Pa.C.S. §§762(a)(3) and 5571(a); Pa.R.A.P. 903(a). He did not do so. Instead, Swoyer attempted to file a motion for a new trial, nine months later, well after the expiration of the applicable appeal period. The law in Pennsylvania governing statutory appeals, which includes motorist appeals of notices of operating privilege suspension imposed by the Department, does not allow the filing of post-trial motions such as the motion for rehearing or a new trial filed by Swoyer in December 1988. *See* Pa.R.C.P.

227.1(g);[2] *Department of Transportation, Bureau of Driver Licensing v. Zurka,* 135 Pa.Cmwlth. 238, 580 A.2d 466 (1990); *Shaw v. Department of Transportation, Bureau of Driver Licensing,* 122 Pa.Cmwlth. 636, 553 A.2d 108 (1989). Additionally, any order entered by a common pleas court granting such an unauthorized motion for a new trial or rehearing in a statutory appeal would be a legal nullity since such post-trial motions are not authorized by Pennsylvania law. *Zurka.*

In addition to motions for new trials not being authorized in such statutory appeals under Pennsylvania law, the

---

[2]Rule 227.1(g) of the Pennsylvania Rules of Civil Procedure, Pa.R.C.P. 227.1(g), provides:

> **Rule 227.1. Post-Trial Relief.**
>
> * * *
>
> (g) A motion for post-trial relief may ***not*** be filed in an appeal from the final adjudication or determination of a local agency or a Commonwealth agency as to which jurisdiction is vested in the courts of common pleas.

Pa.R.C.P. 227.1(g)(Emphasis added).

common pleas court had only 30 days from the date of entry of its original order to modify, rescind vacate, or amend that order. 42 Pa.C.S. §5505.[3] Once that thirty day period had expired, the common pleas court lost jurisdiction and was without the power or authority to vacate, amend or otherwise modify its previous order. *Zurka; Department of Transportation, Bureau of Driver Licensing v. Grassi,* 129 Pa.Cmwlth. 387, 565 A.2d 865 (1989), *appeal granted,* ___ Pa. ___, 578 A.2d 931 (1990). In Swoyer's case, the 30-day modification period of 42 Pa.C.S. §5505 had long since expired when he asked the common pleas court to

---

[3]Section 5505 of the Judicial Code, 42 Pa.C.S. §5505, provides:

> **§5505. Modification of orders**
>
> Except as otherwise provided or prescribed by law, a court upon notice to the parties may modify or rescind any order within 30 days after its entry, notwithstanding the prior termination of any term of court, if no appeal from such order has been taken or allowed.

42 Pa.C.S. §5505.

grant him a new trial on his operating privilege suspension appeal. The common pleas court, under Pennsylvania law, was powerless to grant him the relief he desired in his motion for new trial since that tribunal lacked jurisdiction over the operating privilege suspension appeal. Accordingly, the dismissal of that motion in October of 1989 was proper and mandated by Pennsylvania law. The denial of Swoyer's fourth continuance request was at most, therefore, harmless error.

B. The Trial Court's Refusal to Grant Swoyer a Fourth Continuuance Was Proper Under Pennsylvania Law.

In addition to the denial of Swoyer's fourth continuance request being, at most, harmless error, the Department also respectfully submits that the denial of that continuance was proper and entirely within the common pleas court's discretion under Pennsylvania law. Pa.R.C.P. 216.[4]

---

[4]The pertinent provision of Rule 216 of the Pennsylvania Rules of Civil Procedure under which Swoyer was seeking a continuance was subsection 216(A)(4), which provides:

Rule 216. Grounds for Continuance.

Under Pennsylvania law, a common pleas court judge's discretion in granting or denying a continuance will only be reversed where there is a clear showing that the common pleas court manifestly abused its discretion. *Phoenix Mutual Life Insurance Co. v. Radcliffe on the Delaware, Inc.*, 439 Pa. 159, 266 A.2d 698 (1970).

Here, Swoyer contends that Judge Backenstoe of the Court of Common Pleas of Lehigh County abused his discretion when he refused Swoyer's request to continue the October 5, 1989, hearing on his motion for a new trial due to his lawyer's scheduling conflict. The request for a continuance of the October 5, 1989, hearing was not, however, Swoyer's first continuance request of his motion for new trial. Actually, it was

---

(A) The following are grounds for continuance:

* * *

(4) Such special ground as may be allowed ***in the discretion of the court.***

Pa.R.C.P. 216(A)(4)(Emphasis added).

his ***fourth*** such request. In the order continuing an earlier hearing date to August 1989 the common pleas court had included in its order that no further continuances would be granted. Still, Swoyer was given one last continuance, until October 5, 1989, and Judge Backenstoe included in the August 1989 grant of a continuance to October 5, 1989, that absolutely no further continuances would be granted to Swoyer. There is no abuse of discretion on the part of Judge Backenstoe in refusing to continue this case for a ***fourth*** time. Additionally, Swoyer's request for this fourth continuance was made on October 5, 1989, at the time scheduled for the hearing on his motion for re-hearing, no advance request was made as required by Pa.R.C.P. 216(C).[5]

---

[5]Subsection (C) of Rule 216 of the Pennsylvania Rules of Civil Procedure, Pa.R.C.P. 216(C), provides:

Rule 216. Grounds for Continuance.

* * *

(C) No application for continuance shall be granted if based on a cause existing and known at the time of publication or prior call of the trial list unless the same is presented to the court at a time fixed by the court,

The Pennsylvania Superior Court, in *Lighting Unlimited, Inc., Lighting Pittsburgh Division v. Unger Construction Co.*, 217 Pa.Super. 252, 269 A.2d 368 (1970), upheld the denial of a continuance by a common pleas judge to a party where the continuance request was likewise predicated upon the party's counsel's scheduling conflict with another trial. In upholding the common pleas court's exercise of discretion in denying the requested continuance, the Pennsylvania Superior Court specifically noted that the requesting party had a record of prior continuances covering a period of approximately 10 months and that counsel in that case knew of the pending conflict prior to the date of the arbitration. Like Swoyer's counsel in this matter,

---

> which shall be at least one week before the first day of the trial period. Applications for continuances shall be made to the court or filed in writing with the officer in charge of the trial list, after giving notice of such application by mail, or otherwise, to all parties or their attorneys. Each court may, by local rule, designatethe time of publication of the trial list for the purpose of this rule.

Pa.R.C.P. 216(C).

the counsel in *Lighting Unlimited* also had a commitment in Federal court at the same time as the arbitration that gave rise to the appeal. In that case, the Superior Court noted that the "[p]roper and expedient administration of the court calendar does not permit such known previous commitment to be used as reason for continuing a trial which had already been continued several times." *Lighting Unlimited,* 217 Pa.Super. at ___, 269 A.2d at 369.

Like the absent attorney in *Lighting Unlimited,* Swoyer's counsel also had a conflicting commitment on the day of the hearing that required his presence in Federal court. Like the situation in *Lighting Unlimited,* Swoyer's case had been continued on several previous occasions, with the October 5, 1989, scheduled hearing being 10 months after the initial motion for new trial having been filed.

Pennsylvania's appellate courts have likewise upheld the exercise of discretion by common pleas court judges who deny continuances to a party that had been previously

granted a number of continuances in the same case. For example, the Pennsylvania Supreme Court in *Farmer's National Bank & Trust of New Holland v. New Holland National Bank*, 333 Pa. 428, 5 A.2d 198 (1939), upheld a common pleas court's denial of a continuance to a party where the common pleas court had granted three previous continuances, as is the case here. The Pennsylvania Superior Court in *Pierce v. Penman*, 357 Pa.Super. 225, 515 A.2d 948 (1986), *appeal denied*, 515 Pa. 608, 529 A.2d 1082 (1987), upheld the denial of a continuance to a physician where the physician had been granted previous continuances and had also changed his counsel. Previously, in *In re Hall*, 288 Pa.Super. 495, 532 A.2d 621 (1982), the Superior Court upheld a refusal to grant a continuance to a party that had been previously granted a nine-day continuance to specifically to prepare for the hearing.

C. There is No Federal Issue that Merits the Granting of Swoyer's Petition for Writ of Certiorari.

The Department respectfully submits that this is a

classic example of a frustrated litigant attempting to make a federal case out of a matter that has no business being brought before the Federal judiciary. According to Swoyer, his counsel of choice could not be present at the October 5, 1989, hearing because of a conflicting commitment that required his counsel to appear in federal court on another matter. Swoyer argues that the Supremacy Clause of the Federal Constitution, Article VI, cl. 2, required Judge Backenstoe to grant him that continuance due to his commitment to appear in Federal court. The Supremacy Clause does not come to Swoyer's aid in this case.

The Supremacy Clause, Article VI, cl. 2, provides:

> **Clause 2. Supreme Law of Land.**
>
> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S.Const. Art. VI, cl. 2. The Federal courts have interpreted

the Supremacy Clause as being intended to eliminate the right of any state to regulate the operations of the Federal government without the Federal government's express consent. *See, e.g., United States v. State Corporation Commission of Commonwealth of Virginia,* 345 F.Supp. 843 (E.D.Va. 1972), *aff'd,* 409 U.S. 1094 (1973). Where state law interferes with, or is contrary to, Federal law, the state law must yield. *Free v. Bland,* 369 U.S. 663 (1962).

The Department respectfully submits that the Article VI, cl. 2, is inapplicable to this case. The Supremacy Clause does not support direct causes of action, rather, it merely gives priority to federal rights created by Federal statutes when those Federal rights conflict with state laws. *See, e.g., Mashpee Tribe v. Watt,* 542 F.Supp. 797 (D.Mass. 1982), *aff'd,* 707 F.2d 23 (1st Cir. 1983), *cert. denied,* 464 U.S. 1020 (1983). There is, of course, no Federal constitutional provision, statute or rule of court that mandates that a party to a lawsuit in a state court whose lawyer has a scheduling conflict in Federal court is entitled

to a continuance of the state court proceeding so that the lawyer may appear in Federal Court. Nor is there any reported Federal or Pennsylvania appellate decision that holds that Article VI, cl. 2, of the Federal Constitution requires a state trial court to grant a party a continuance on the basis that the requesting party's counsel of choice has a scheduling conflict due to a required appearance in Federal Court. In fact, this very Court has held that the States may establish rules of procedure governing litigation in their ***own*** courts. *Felder v. Casey*, 487 U.S. 131 (1988). This matter involves a ***Pennsylvania*** claim, brought in a ***Pennsylvania*** trial court, governed by ***Pennsylvania*** law and rules of court. Accordingly, the Department respectfully submits that there is absolutely no Federal issue present in this case warranting review by this Honorable Court.

D. Swoyer's Petition for Writ of Certiorari is Frivolous Warranting Sanctions Under Rule 42.2.

In addition to there being no Federal issue of merit warranting review by this Honorable Court, the Department

also contends that Swoyer's Petition for Writ of Certiorari is frivolous within the meaning of Supreme Court Rule 42.2 and requests that this Honorable Court grant the Department an award of double costs and reasonable attorney's fees pursuant to Rule 42.2.[6] The Department further requests that such an award be made against Swoyer and his appellate counsel, jointly and severally, as specifically permitted by Rule 42.2.

This petition is frivolous for a number of reasons. First, the Department notes that Swoyer has presented no Federal issue that warrants review by this Honorable Court and that the issue was decided by the Pennsylvania Commonwealth Court based upon that Court's interpretation of a ***Pennsylvania*** rule of

---

[6]Supreme Court Rule 42.2 provides:

> **.2.** When a petition for writ of certiorari, an appeal, or application for other relief is frivolous, the Court may award the respondent or appellee just damages and single or double costs. Damages or costs may be awarded against the petitioner, appellant, or applicant, or against the party's attorney, or against both.

civil procedure, using Pennsylvania law. Additionally, the hearing that Swoyer sought to have continued for a ***fourth*** time pertained to a motion that Swoyer had no authority to file, that the common pleas court had no jurisdiction to entertain, and sought relief that the common pleas court was powerless to grant. Even if the common pleas court did err in refusing to grant Swoyer yet another continuance of the hearing on his motion for new trial, that error was at best harmless error. Finally, the Pennsylvania Commonwealth Court specifically found that Swoyer's appeal to ***that*** Court was frivolous under Pennsylvania law within the meaning of Pa.R.A.P. 2744 and granted the Department an award of costs and reasonable counsel fees against Swoyer and his appellate counsel, jointly and severally.

This Court, in *McCoy v. Court of Appeals of Wisconsin, District 1*, 486 U.S. 429 (1988), when dealing with an appellate attorney's obligations to the Court in filing and prosecuting a *criminal* appeal, said:

Neither paid nor appointed counsel may deliberately

> mislead the court with respect to either the facts or the law, or consume the time and energies of the court ***or the opposing party*** by advancing frivolous arguments. An attorney, whether appointed or paid, is therefor under an ethical obligation to refuse to prosecute a frivolous appeal.
>
> > "A lawyer, after all, has no duty, indeed, no right, to pester a court with frivolous arguments, which is to say arguments that cannot conceivably persuade the court, * * * United States v. Edwards, 777 F.2d 364, 365 (7th Cir. 1985).
> >
> > When retained counsel concludes that an appeal would be frivolous, he or she has a duty to advise the client that it would be a waste of the client's money to prosecute the appeal and that it would be unethical for the lawyer to go forward with it.

McCoy, 486 U.S. at 436-437 (Emphasis added). In *Polk County v. Dodson*, 454 U.S. 312 (1981), this Honorable Court also held that it was the ethical obligation of every lawyer, whether paid or appointed, not to clog the courts with frivolous motions or appeals. *Dodson*, 454 U.S. at 323.

Here, Swoyer ignores the patent jurisdictional defect present at the common pleas court level that absolutely precluded that court from granting the ultimate relief he desired,

a new trial on his implied consent law suspension, and instead attempts to focus this Honorable Court's attention on his purported Federal constitutional claim under the Supremacy Clause. Under Pennsylvania law, spanning a period of over a century and a half, has consistently held that an order or judgment rendered by a tribunal lacking subject-matter jurisdiction is void and of no legal effect and is subject to collateral attack by any party in any proceeding against whom such a judgment or order is sought to be interposed. *See, e.g., Smith v. Gallagher,* 408 Pa. 530, 185 A.2d 135 (1962); *Moskowitz's Registration Case,* 329 Pa. 183, 196 A. 498 (1938); *Simpson's Estate,* 253 Pa. 217, 98 A. 35 (1916); *Wall v. Wall,* 123 Pa. 545, 16 A. 598 (1889); *Camp v. Wood,* 10 Watts 118 (Pa. 1840). Thus, any order by the common pleas court purporting to vacate the January 1988 order dismissing Swoyer's operating privilege suspension appeal and granting Swoyer a re-hearing or new trial on that appeal would, under Pennsylvania law, be void *ab initio* and of no legal force or effect. *See*

Tarnopolski v. Department of Transportation, Bureau of Driver Licensing, ___ Pa.Cmwlth. ___, 589 A.2d 289 (1991)(order of district justice purporting to acquit minor of underage drinking charge entered after expiration of modification or appeal period following minor's initial conviction of that charge was void since the district justice lacked subject-matter jurisdiction over minor's criminal case under Pennsylvania law).

In interpreting Pennsylvania's rule of appellate procedure dealing with sanctions for frivolous appeals, the Pennsylvania Supreme Court, in *Robinson v. Pennsylvania Board of Probation and Parole*, 525 A.2d 505, 582 A.2d 857 (1990), held that an appeal was frivolous and the appellant's attorney was subject to sanctions where an appeal was filed outside of the applicable appeal period, with no explanation given for the untimely filing, thus depriving the court of jurisdiction over the appeal, and the attorney ignores the patent jurisdictional defect

constituted a frivolous appeal under Pa.R.A.P. 2744.[7] Thus, under the reasoning set forth by the Pennsylvania Supreme Court in *Robinson*, Swoyer's conduct in continuing to pursue his purported Federal claim under the Supremacy Clause to this Honorable Court while continuing to ignore the patent jurisdictional defect that deprived the common pleas court of

---

[7]Rule 2744 of the Pennsylvania Rules of Appellate Procedure, Pa.R.A.P. 2744, provides:

> **Rule 2744. Further Costs. Counsel Fees. Damages for Delay.**
>
> In addition to other costs allowable by general rule or Act of Assembly, an appellate court may award as further costs damages as may be just, including
>
> (1) a reasonable counsel fee; and
>
> (2) damages for delay at the rateof 6% per annum in addition to legal interest,
>
> if it determines that an appeal is frivolous or taken solely for delay or that the conduct of the participant is dilatory, obdurate or vexatious. The appellate court may remand the case to the trial court to determine the amount of damages authorized by this rule.

Pa.R.A.P. 2744. *See also* Darlington, McKeon, Schuckers & Brown, 2 Pennsylvania Appellate Practice §2744:2 (1990 Supp.).

jurisdiction to hear his underlying State claim, constitutes a frivolous appeal. While this Court is clearly not bound by the characterization of such appeals set forth by the Pennsylvania Supreme Court in *Robinson*, the Department respectfully submits that the reasoning used by the Pennsylvania Supreme Court is sound and logical and supports the Department's claim here for sanctions under Supreme Court Rule 42.2. *See also Smith v. Pennsylvania Board of Probation and Parole*, 524 Pa. 500, 574 A.2d 558 (1990).

The Department respectfully submits that this Honorable Court grant the Department's application for sanctions under Supreme Court Rule 42.2 and impose reasonable attorneys' fees and double costs against both Swoyer and his appellate counsel, jointly and severally. Swoyer clearly filed a motion with the common pleas court that, under Pennsylvania law, he was not authorized to file nor was the common pleas court vested with authority to grant the relief he sought. Pa.R.C.P. 227.1(g); *Zurka; Grassi*. The Commonwealth Court of Pennsylvania, on

Swoyer's initial appeal of Judge Backenstoe's dismissal of his unauthorized motion and refusal to grant a fourth continuance, clearly held that the motion and relief Swoyer sought from Judge Backenstoe was not authorized in statutory appeals and that Judge Backenstoe was without jurisdiction to grant Swoyer the relief he sought. The Commonwealth Court also found Swoyer's appeal from the dismissal of his unauthorized motion frivolous under Pa.R.A.P. 2744 and granted the Department an award of reasonable counsel fees and costs under that rule against both Swoyer and his appellate counsel. Swoyer then sought review by the Pennsylvania Supreme Court, again ignoring the clear jurisdictional defect upon which the Commonwealth Court based its ruling that Swoyer's appeal was frivolous and its award of sanctions. The Pennsylvania Supreme Court denied allowance to appeal and Swoyer has advanced the same tired argument to this Honorable Court, still ignoring the glaring, and fatal, jurisdictional defect that precludes the common pleas court from granting him the relief he initially sought. At each of these

proceedings, the Department has been required, as it is here, to defend against Swoyer's appeals, causing needless expense to the taxpayers of the Commonwealth of Pennsylvania. As set forth by this Court in *McCoy*, neither Swoyer nor his appellate counsel, Mr. Orloski, have a right to pester this Court with frivolous motions or appeals. 486 U.S. at 436. As a result of Swoyer's frivolous petition for certiorari filed with this Honorable Court, the taxpayers of the Commonwealth of Pennsylvania have been forced, through the expenditure of the time and energies of the Department's attorneys and clerical staff, to incur needless costs and expenses. Rule 42.2 allows this Court to place the burden of those costs and expenses upon the party at fault in frivolous cases and the Department respectfully requests that this Honorable Court grant the Department's application for sanctions under Rule 42.2 against both Swoyer and his appellate counsel, Richard J. Orloski, Esquire, jointly and severally.

CONCLUSION

For the reasons set forth above, the Commonwealth of Pennsylvania, Department of Transportation, respondent herein, respectfully submits that a writ of certiorari should not be granted in this case and the respondent should be awarded damages in the form of reasonable attorneys' fees and double costs against Ronald Francis Swoyer and his appellate counsel, Richard J. Orloski, Esquire, jointly and severally, as provided in Supreme Court Rule 42.2.

Respectfully submitted,

Timothy P. Wile
Assistant Counsel-in-Charge
Appellate Section
Counsel of Record

John L. Heaton
Chief Counsel

Harold H. Cramer
Assistant Chief Counsel
Vehicle & Traffic Law Division

Pennsylvania Department
of Transportation

Attorneys for Respondent